Supreme Court, U.S.
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No. 00-299

IN THE

Supreme Court of the United States

DENISE MITTEN,

Petitioner,

v.

MARK LaCHAPELLE, VALERIE OHANIAN and L.M.K.O.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENT VALERIE OHANIAN

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QUESTION PRESENTED

Petitioner has failed to establish that there is any conflict between the courts as to the appropriate standard governing *initial* custody determinations, or that the interest in the protection of children is not a compelling state interest. One of many factors in the best interests analysis is the proposed residence of the child. This factor alone bears on a number of related factors including the continuity and stability in the child's life, the opportunity to maintain significant familial ties, and the opportunity for meaningful visitation with the noncustodial parent. Upon analysis of the unique facts of each case, if a court determines that a proposed relocation is not in the best interests of the child, other jurisdictions have found that conditioning custody on the residence of the child is appropriate. Further, Petitioner has failed to offer any evidence that conditional custody awards in initial custody determinations have been found to be unconstitutional in any jurisdiction. The Petitioner's suit in this case, seeks to change the case-by-case "best interest" analysis into a "national standard" that focuses not on the best interests of the child, but on the interests of the proposed custodial parent. Accordingly, the question presented is:

Where the Minnesota Court of Appeals affirmed the trial court's decision in conditioning Petitioner's custody on maintaining the child's residence in Minnesota, and review was denied on two occasions by the Minnesota Supreme Court, was it correct in its holding that a restriction on a child's residence, when it is in the child's best interest, is not violative of the custodial parent's right to travel or the parent's right of privacy?

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Respondent Valerie Ohanian ("Ohanian"), respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Minnesota Court of Appeals' decision in *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000), *review denied*, (Minn. May 16, 2000), *motion to suspend Minn. R. Civ. App. P. 140.01 denied*, (Minn. June 27, 2000). Contrary to Petitioner's argument, she has failed to establish that there is any conflict between the courts as to the appropriate standard governing *initial* custody determinations or that the interest in the protection of children is not a compelling state interest. In affirming the trial court's conditional custody award to Petitioner, the Minnesota Court of Appeals correctly held that a conditional custody order that restricts the residence of a child does not violate the proposed custodial parent's right to travel or right to privacy where the restriction on the child's residence is in the best interests of the child. Petitioner has failed to offer any evidence that such restrictions are unconstitutional. *See infra* at III. In fact, it appears that the state courts that have considered this issue have held that such restrictions are constitutionally permissible. Thus, as state courts have not applied conflicting standards as to the proper analysis of conditional initial custody orders and such restrictions have been held to be a constitutional restriction advancing the State's compelling interest in the protection of children's interests, this petition should be denied. Moreover, as there is nothing in the record that Petitioner has ever notified the Attorney General of the State of Minnesota as to her constitutional challenge, this petition should be denied.

STATEMENT OF THE CASE

A. Mitten And Ohanian Decide To Start A Family.

Appellant Denise Mitten ("Mitten") and Respondent Valerie Ohanian ("Ohanian") were same-sex partners in a relationship that lasted over ten years. Petition for Writ of Certiorari ("Petition for Writ"), Appendix ("App.") B, at 36a, Finding 2. During the course of their relationship, Mitten and Ohanian decided to start a family together. Through a mutual friend, they were introduced to Mark LaChapelle ("LaChapelle") and LaChapelle's life partner, Scott Brush ("Brush"). *Id.* In 1990, Mitten and Ohanian met with LaChapelle and Brush to discuss the possibility of conceiving a child through artificial insemination. All three parties entered into a written agreement whereby LaChapelle would donate sperm for the artificial insemination of Mitten and LaChapelle would waive all parental rights. *Id.* at 36a, Finding 3.

Mitten became pregnant in 1992, and she and Ohanian prepared for the birth of their child. In addition to discussing parenting issues and infant care, they entered into a second "Best Interests Agreement" with the assistance of an attorney to protect and promote Ohanian's relationship with the child. The Best Interests Agreement held both Mitten and Ohanian responsible for providing for the child's needs and declared that Mitten and Ohanian would be the parents of the child, and that they would share joint physical custody of the child in the event of a separation. This Agreement also provided that LaChapelle and Brush would be entitled to "have significant relationships" with the child, including regular visitation. The child, L.M.K.O., was born on January 4, 1993. *Id.* at 37a, Findings 5, 7.

After L.M.K.O's birth, Mitten and Ohanian petitioned for adoption, and the court granted the adoption in September 1993. Petition for Writ, App. B, at 37a. For the first three and one-half years of her life, L.M.K.O. was raised in Minneapolis, Minnesota, residing with her adoptive parent, Ohanian (whom she called "Mama"), and her biological mother, Mitten (whom she called "Mommy"). *Id.* at 53a. During this time, L.M.K.O. developed a very intimate relationship with both Mitten and Ohanian, and both parties were emotional parents to L.M.K.O. Petition for Writ, App. B, at 53a, Finding 61(d). An emotional parent is one to whom a child looks to for both comfort, solace, and security. *Id.* Mitten, Ohanian, and L.M.K.O. lived as a family for over three and one-half years, during which time Ohanian was the primary income earner who had provided for Mitten and L.M.K.O.'s support. Petitioner's assertion in her Petition for Writ of Certiorari that she "quit her job in order to be a stay-at-home-mom," is not true and has never been apart of the record. Moreover, Mitten's assertion that Ohanian did not become involved in the legal proceedings until Mitten secured employment in rural Michigan is also contrary to the facts contained in the record. Ohanian has been intimately involved as a parent throughout L.M.K.O.'s life, and has been involved in these legal proceedings since her petition to adopt L.M.K.O.'s was filed in 1993.

LaChapelle and Brush had enjoyed frequent visitation with L.M.K.O from birth until August 1994. At that point, Mitten terminated LaChapelle's visitation with L.M.K.O. due to rising tension between the parties. Petition for Writ, App. at 38a, Finding 10. Following the termination of his visitation, LaChapelle brought a motion to vacate the adoption order and to adjudicate LaChapelle as the biological father of L.M.K.O. The adoption order was vacated on

August 7, 1995, and temporary legal and physical custody was granted to Mitten. *Id.* at 38a, Finding 12.

B. Mitten And Ohanian End Their Relationship And Ohanian Petitions For Joint Physical And Legal Custody.

Mitten and Ohanian ended their relationship during the spring of 1996. Petition for Writ, App. B, at 39a. Later that year, Mitten sought permission from the court to move her residence to Hersey, Michigan for employment reasons. At the same time, Ohanian petitioned the Court for joint legal and joint physical custody of L.M.K.O. Petition for Writ, App. B, at 40a. On August 30, 1996, the trial court denied Ohanian's custody motion as premature and granted Mitten permission to temporarily move her residence to Michigan.[1] *See* Petition for Writ, App. A, at 15a-16a. To protect Ohanian's and LaChapelle's rights to see L.M.K.O. pending a determination on custody, the court also ordered the parties to select a Visitation Expeditor to establish a schedule for temporary visitation. Petition for Writ, App. B, at 40a, Finding 23.

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1. Minnesota Statutes section 518.131 allows the court, in a custody proceeding, to grant temporary custody to one parent pending the final disposition of the proceeding. Minn. Stat. § 518.131, subd. 1. Unless modified, the temporary order continues in effect until entry of a final decree and a temporary order "[s]hall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding." Minn. Stat. § 518.131, subd. 5, 9(a). Although Mitten later argued that the trial court's order was not temporary, the Minnesota Court of Appeals held that any ambiguity in the trial court's order "was resolved against Mitten in the June 1997 order by the same judge who issued the earlier order." Petition for Writ, App. A, at 16a.

After living in rural Michigan for only one year, Mitten was terminated from her full-time employment. Following this termination, Mitten was unable to secure full-time employment in Michigan. Petition for Writ, App. B, at 46a-47a, Finding 38. However, Mitten continued to reside in rural Michigan with L.M.K.O pending the custody proceedings in Minnesota. Petition for Writ, App. B, at 46a-47a. The court entered an order on April 3, 1997, granting Ohanian and LaChapelle monthly interim visitation for one four-day weekend per month alternating between Michigan and Minnesota.

Hersey, Michigan is a very rural area with no practical places for Ohanian and LaChapelle to stay within L.M.K.O.'s community. Petition for Writ, App. B at 48a, Finding 43. The parties have had to stay in hotels and college dormitories. While Mitten resided in Michigan, neither Ohanian nor LaChapelle knew where Mitten lived with L.M.K.O. Petition for Writ, App. B, at 48a, Finding 44. Mitten refused to permit either party from picking up L.M.K.O. at her home. Instead, the parties were required to meet L.M.K.O. at a car wash. Moreover, Mitten did not even permit the parties to visit with L.M.K.O. during school or community events. Both the cumbersome logistics of the visitation and Mitten's refusal to allow the parties to have any meaningful visitation with L.M.K.O., have deprived L.M.K.O. of regular and frequent contact with both Ohanian and LaChapelle. Petition for Writ, App. B, at 49a, Finding 48. With L.M.K.O. now in school, frequent trips or visitation with Ohanian and LaChapelle would be extremely difficult if she resided in Michigan, and the travel requirements would be onerous. This finding of the trial court was supported by the testimony of the guardian ad litem (Nathanson), as well as the independent custody and visitation expert (Dr. Irvin)

appointed by the trial court. Petition for Writ, App. B, at 49a-50a, Findings 50, 51. "The location of L.M.K.O.'s residency and the manner in which visitation occurs, especially during the next few years, will greatly impact L.M.K.O.'s relationship with each of her three parents." Petition for Writ, App. B, at 51a, Finding 58.

C. The Parties Enter Into A Settlement Agreement.

Prior to commencement of trial, Mitten and Ohanian agreed to share joint legal custody and the court approved their agreement as in L.M.K.O.'s best interests. Petition for Writ, App. B,. at 44a-46a. That agreement also provided LaChapelle the opportunity to provide input on significant decisions involving L.M.K.O., including education, medical care, childcare, religious training, and extracurricular activities. Petition for Writ, App. B at 44a. Additionally, LaChapelle was to be provided access to information and records pertaining to L.M.K.O.'s education, activities, medical and dental care, and other significant information. *Id.* at 45a. Mitten, through counsel, acknowledged and conceded the parties' agreement in her post-trial memorandum to the district court. Petition for Writ, App. A at 11a-12a.

D. After Extensive Testimony And Detailed Findings The Court Found That A Conditional Custody Award Is In The Child's Best Interests.

After a trial in February 1999, the court awarded sole physical custody of L.M.K.O. to Mitten on the condition that Mitten provide a permanent residence for L.M.K.O. in Minnesota. Petition for Writ, App. B, at 56a. The court found that the parties had agreed before trial that Mitten and

Ohanian would have joint legal custody of L.M.K.O., and the court ruled that such custody was in L.M.K.O.'s best interests. *Id.* The court found that LaChapelle's and Ohanian's relationships with L.M.K.O. could not be maintained or further developed with continued visitation in rural Michigan. Specifically, the court found as follows:

> - LaChapelle and Ohanian travel to Michigan every other month for a three-four day visitation period with L.M.K.O. On the alternating months, L.M.K.O. travels to the Twin Cities for visitation with LaChapelle and Ohanian. Petition for Writ, App. B, at 47a, Finding 39.
>
> - Hersey, Michigan is a rural area. Generally, when LaChapelle and Ohanian have visitation in Michigan, they must fly to the Reed City airport, rent a car, and drive two to three hours to Hersey. . . . Petition for Writ, App. B, at 47a, Finding 40.
>
> - LaChapelle and Ohanian do not know exactly where L.M.K.O. lives—they have never been to or seen Mitten's home. Generally, when Mitten and Ohanian meet to exchange L.M.K.O. for visitation, they meet at a car wash some distance from Mitten's home. Mitten has been reluctant to (and generally has not permitted) Ohanian or LaChapelle to meet [L.M.K.O.] at other places such as [L.M.K.O.]'s school, a social event, a community event, or an extracurricular activity. Petition for Writ, App. B, at 48a, Finding 44.

- Both the logistics of the visitation and Mitten's reluctance to allow LaChapelle and Ohanian to attend [L.M.K.O.]'s school and extracurricular activities have prevented LaChapelle and Ohanian from becoming integrated in [L.M.K.O.]'s Michigan community. Petition for Writ, App. B, at 48a, Finding 45.

- Due to the logistics and artificial settings where the visitation occurs (college dormitories, cabins, and hotels), LaChapelle and Ohanian's visitation with [L.M.K.O.] in Michigan is not conducive to maintaining or further developing their parental roles and relationship with [L.M.K.O.]. Petition for Writ, App. B, at 49a, Finding 46.

- Were [L.M.K.O.]'s residence to remain in Michigan, this Court is hard pressed to see how a meaningful parental relationship could be maintained between [L.M.K.O.] and LaChapelle or Ohanian. Petition for Writ, App. B, at 49a, Finding 47.

- [L.M.K.O.]'s residency in Hersey, Michigan has denied LaChapelle and Ohanian regular and frequent contact with [L.M.K.O.]. Likewise, [L.M.K.O.] has been denied regular and frequent contact with LaChapelle and Ohanian. Petition for Writ, App. B, at 49a, Finding 48.

- Irvin [Dr., custody and visitation expert appointed by the court] testified that her first request would be to have Mitten and [L.M.K.O.] move back to the Twin Cities metro area; or, in the alternative, Mitten and [L.M.K.O.] should move to a location with (sic) two hours of the Twin Cities metro area. Irvin ultimately recommended that [L.M.K.O.] live in the Twin Cities. Petition for Writ, App. B, at 49a, Finding 50.

- Nathanson [guardian ad litem] testified that although [L.M.K.O.]'s experience in Michigan has been a good one, it is in [L.M.K.O.]'s best interest to move back to Minnesota and that the move should occur before [L.M.K.O.] enters first grade. Petition for Writ, App. B, at 50a, Finding 51.

- Life would be easier for [L.M.K.O.] if she did not have to travel. Moreover, the less travel obstacles that exist for [L.M.K.O.] to have visitation with each of her parents, the more contact [L.M.K.O.] will have with each of her parents and the better off [L.M.K.O.] will be. Petition for Writ, App. B, at 50a, Finding 55.

- [L.M.K.O.] has substantial ties in the Twin Cities area, including family and friends. Petition for Writ, App. B, at 50a, Finding 56.

- Irvin testified that [L.M.K.O.] hard (sic) time figuring out what she is feeling and what makes her happy. Irvin also testified that

[L.M.K.O.] stands less of a chance of this occurring if she were to live in LaChapelle and Ohanian's community (the Twin Cities). Petition for Writ, App. B, at 50a, Finding 57.

- In most custody/visitation decisions, a court need only allocate custody and visitation between two parents; however, the circumstances of this case are unique. The fact that visitation must be arranged between three parents each month, several times a month, greatly compounds the problems created by the distance between Michigan and Minnesota. When this Court previously granted Mitten's request to move to Michigan, it was not known at that time how custody and visitation would be allocated between the three adults. Since then, and through the course of this trial, the Court has become acutely aware of how significant [L.M.K.O.]'s relationship is with Mitten, LaChapelle, and Ohanian. This Court is also acutely aware of how the distance between Michigan and Minnesota has impacted [L.M.K.O.]'s life and her relationship with each of these adults. Were [L.M.K.O.] to remain in Michigan, it is not likely that she would be able to maintain meaningful, intimate relationships with Ohanian and LaChapelle. The location of her residency and the manner in which visitation occurs, especially during the next few years will greatly impact [L.M.K.O.]'s relationship with each of these three adults. Neither Mitten's desire to live in rural Michigan nor

> the convenience and expense incurred by LaChapelle and Ohanian in visiting [L.M.K.O] there are the primary factors with which this Court bases its decision. Instead, this Court looks at [L.M.K.O.]'s best interests in deciding how custody, visitation, and her residency can provide meaning, positive, parental relationships with each of her three parents. Petition for Writ, App. B, at 51a, Finding 58.
>
> - Dr. Irvin testified that [L.M.K.O.] needs at least monthly contact with LaChapelle and Ohanian, and she recommended weekly contact with LaChapelle and Ohanian if [L.M.K.O.] were to reside in Minnesota. Petition for Writ, App. B, at 57a, Finding 65.
>
> - Nathanson [guardian ad litem] testified that ordinary, day to day contact with all three parents should be explored. Petition for Writ, App. B, at 57a, Finding 66.
>
> - It is in [L.M.K.O.]'s best interest to have weekly in person contact with LaChapelle and Ohanian after September 1, 1999. Petition for Writ, App. B, at 57a, Finding 69.

Contrary to Mitten's assertions, the court did not require L.M.K.O. to live in Minnesota based "purely upon its determination that if she lived there she could maintain a relationship with Mitten, Ohanian, and LaChapelle." Petition for Writ at 6. Rather, the court found that it was in L.M.K.O.'s *best interests* that she reside in Minnesota based on a variety

of factors including L.M.K.O.'s substantial ties in the Twin Cities area, including family and friends, and L.M.K.O.'s ability to maintain positive parental relationships with each of her three parents. Petition for Writ, App. B, at 51a, Finding 58.

E. Mitten's Subsequent Appeals.

Mitten appealed the grant of joint legal custody, conditional sole physical custody, the final awards, and the denial of the name change. On March 14, 2000, the Minnesota Court of Appeals affirmed the district court's decision granting Mitten sole physical custody on the condition that she move back to Minnesota, and granting Mitten and Ohanian joint legal custody with LaChapelle having the right to participate in important decisions affecting L.M.K.O. Petition for Writ, App. A, at 31a. On April 11, 2000, Mitten petitioned the Minnesota Supreme Court for review of the Court of Appeals decision dated March 14, 2000. Mitten's request was summarily denied on May 16, 2000. Mitten then brought a motion for the Minnesota Supreme Court to suspend Rule 140.01 of the Minnesota Rules of Civil Appellate Procedure to allow for a reconsideration of her petition for review. That petition was denied on June 27, 2000.

REASONS FOR DENYING THE WRIT

I. MITTEN HAS NOT PROPERLY CHALLENGED THE CONSTITUTIONALITY OF ANY MINNESOTA STATUTE.

While she does not explicitly argue that a specific Minnesota statute is unconstitutional, Mitten does implicitly argue that a national custody standard should replace the

best interests standard set forth in Minnesota Statute § 518.17 because the current standard infringes upon her constitutional right of privacy and right to travel. Petition for Writ at 15. Mitten argues that the trial court's conditional custody order violates her constitutional right of privacy and right to travel because the current statutory scheme allows family courts to "second-guess a parent's decision where to raise his or her child." Petition for Writ at 17. However, there is no indication in the record that Mitten ever notified the attorney general that the constitutionality of any statute was being challenged as required by Minn. R. Civ. P. 24.04 and Minn. R. Civ. App. P. 144 throughout these proceedings.

Rule 24.04 of the Minnesota Rules of Civil Procedure provides that "[w]hen the constitutionality of an act of the legislature is drawn in question . . . . the party asserting the unconstitutionality of the act shall notify the attorney general thereof within such time as to afford the attorney general an opportunity to intervene." Minn. R. Civ. P. 24.04; *see also* Minn. R. Civ. App. P. 144 (requiring similar notice to attorney general on appeal). The Minnesota Supreme Court has held, "In absence of compliance, we will not consider the constitutionality of a statute." *In re Appeal of Leary*, 272 Minn. 34, 47, 136 N.W.2d 552, 560 (1965); *see also Benson v. Hackbarth*, 481 N.W.2d 375, 379 (Minn. Ct. App. 1992), *review denied*, (Minn. Apr. 27, 1992) (where the attorney general is not notified that the constitutionality of a statute is being challenged, the case will not be reviewed on appeal).

The United States Supreme Court has a similar rule that provides:

> In any proceeding in this Court wherein the constitutionality of any statute of a State drawn

> in question, and the state or any agency, officer, or employee thereof is not a party, the initial pleading, motion or paper in this Court shall recite that 28 U.S.C. § 2403(b) may be applicable *and shall be served upon the Attorney General of the State.*

Sup. Ct. R. 29(c) (emphasis added). Again, Mitten has failed to comply with the notice requirements under the Rules of this Court. Thus, in the absence of compliance with the notifications required by Minnesota Rules of Civil Procedure 24.04, Minnesota Rules of Civil Appellate Procedure 144, and Supreme Court Rule 29.4(c), the constitutionality of any Minnesota Statute in this case should not be considered.

II. MITTEN HAS FAILED TO ESTABLISH THAT THERE IS ANY CONFLICT BETWEEN THE COURTS AS TO THE APPROPRIATE STANDARD GOVERNING INITIAL CUSTODY DETERMINATIONS.

The "best interests" standard is "the lodestar for determining a custody award." *Jaramillo v. Jaramillo*, 823 P.2d 299, 302 (N.M. 1991), *reh'g denied*, Jan. 16, 1992. This is true in Minnesota, and "probably for all jurisdictions in this country." *Id.* (citing *Garcia v. Garcia*, 466 P.2d 554, 566 (N.M. 1970) (referring to "the universal rule that the best interests of the child are paramount"); *Frauenshuh v. Giese*, 599 N.W.2d 153, 158-59 (Minn. 1999) (best interests of child are "paramount" concern in resolution of custody issues); *Hartman v. Hartman*, 476 A.2d 938, 939 (Pa. 1984) ("It is well-established that the sole criterion in child custody decisions is the best interests and welfare of the child."). Mitten argues that this Court should set forth a national

standard in determining custody issues with bright line rules that focus on the custodial parent's needs, rather than the best interests of the child. Bright line rules regarding relocation issues in initial custody determinations, however, are inappropriate — each case must be evaluated on its own unique facts. *See Burgess v. Burgess*, 913 P.2d 473, 483 (Cal. 1996).

Mitten's argument that state courts are in conflict as to the appropriate standard to apply when initially determining the residence of a minor child, is unpersuasive. In support of her argument, Mitten cites a handful of state court decisions. However, those decisions do not support her argument because they either involve a *modification* of an *existing* custody award,[2] or the cases clearly support the trial court's conclusion that in an *initial* custody determination, the determination of a minor child's residence is subject to the best interests standard.[3]

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2. Mitten appeals from the trial court's *initial* custody determination. The modification of an *existing* custody award requires a heightened standard in many jurisdictions. *See In re Marriage of Francis*, 919 P.2d 776 (Colo. 1996), *reh'g denied*, July 29, 1996 (endangerment standard applied to determination as to a change in custody of children based on proposed relocation); Janet Leach Richards, Children's Rights v. Parent's Rights: A Proposed Solution to the Custodial Relocation Conundrum, 29 N.M. L. Rev. 245, 248 (Spring 1999) (where relocation precipitates a petition for a change of custody, the court applies the appropriate statutory standard).

3. *See Burgess v. Burgess*, 913 P.2d 473, 483 (Cal. 1996) (in *initial* custody determinations, trial court must look to all circumstances bearing on best interest of minor child, including residence, community ties, health and educational needs); *McAlister*

(Cont'd)

Under Minnesota law, the proposed change of residence by one party in an initial custody proceeding is treated by the trial court as a factor to balance in determining the custody of the child. *Stangel v. Stangel*, 355 N.W.2d 489, 490 (Minn. Ct. App. 1984), *review denied* (Minn. Feb. 6, 1985). In *Stangel*, the trial court bifurcated the questions of custody and a proposed move to Louisiana by the mother. The trial court first determined who should have custody, and then it considered the proposed move. However, the Minnesota Court of Appeals noted that the court should have treated the proposed move as simply another factor to balance in determining who should have custody under Minn. Stat. § 518.17. *Stangel*, 355 N.W.2d at 490. The child's residence bears directly on several of the best interest factors in Minnesota Statutes Section 518.17.[4]

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v. Patterson, 299 S.E.2d 322 (S.C. 1982) (conditional custody award based on mother's residence within same county held to be in the child's best interests); *Jaramillo v. Jarmillo*, 823 P.2d 299 (N.M. 1991), *reh'g denied*, Jan. 16, 1992 (evidence supported finding that moving to New Hampshire would be in the best interests of the child); *Stevison v. Woods*, 560 So. 2d 176 (Miss. 1990) (parent's move to Alaska with child justified change of custody where move had adverse effect on child's welfare); Carol S. Bruch & Janet M. Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 Fam. L.Q. 245, 263 ("[a]n initial custody decision between parents is, of course, handled with the best interest standard").

4. Minnesota Statutes section 518.17 provides in pertinent part:

> Subdivision 1. The best interests of the child. (a) "The best interests of the child" means all relevant factors to be considered and evaluated by the court including:
>
> (Cont'd)

(Cont'd)

(1) the wishes of the child's parent or parents as to custody;

(2) the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference;

(3) the child's primary caretaker;

(4) the intimacy of the relationship between each parent and the child;

(5) the interaction and interrelationship of the child with a parent or parents, siblings, and any other person who may significantly affect the child's best interests;

(6) the child's adjustment to home, school, and community;

(7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity;

(8) the permanence, as a family unit, of the existing or proposed custodial home;

* * *

If the court awards joint legal or physical custody over the objection of a party, the court shall make detailed findings on each of the factors in this subdivision and explain how the factors led to its determination that joint custody would be in the best interests of the child.

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> The factors stressing stability and continuity of care are of particular importance in light of a parent's proposed move to another state. Also important are the intimacy of the relationships between each parent and the child; the interaction of the child with parents and other people who affect the child's best interests; the child's adjustment to home, school, and community; and the permanence, as a family unit, of the existing or proposed custodial home.

Petition for Writ, App. A, at 17a (citing Minn. Stat. § 518.17, subd. 1(a)(4)-(8) (1998)).

In making this initial custody determination, the overwhelming majority of jurisdictions follow a best interest

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> Subd. 3. Custody order. (a) Upon adjudging the nullity of a marriage, or in a dissolution or separation proceeding, or in a child custody proceeding, the court shall make such further order as it deems just and proper concerning:
>
> (1) the legal custody of the minor children of the parties which shall be sole or joint;
>
> (2) their physical custody and residence; and
>
> (3) their support. In determining custody, the court shall consider the best interests of each child and shall not prefer one parent over the other solely on the basis of the sex of the parent.

Minn. Stat. § 518.17 (1999).

approach. *See Jaramillo*, 823 P.2d at 302. A determination of a child's best interests includes findings as to the minor child's residence. A trial court is given wide discretion in fashioning custody awards, and may appropriately determine to condition custody if the conditions serve the best interests of the child.[5] For example, in *Sebastian v. Sebastian*, 524 N.E.2d 29, 33 (Ind. Ct. App. 1988), the Indiana Court of Appeals upheld the trial court's discretion to condition the mother's custody of her child on the mother's return to the United States from Japan where she was stationed in the Air Force. Although the court noted that while there were no reported Indiana cases awarding custody to a parent who resides in a foreign country, custody is often awarded to a parent who resides in or moves to another state *if it is in the best interests of the child to do so. Id.* (emphasis added) (citations omitted).

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5. *See Clark v. Atkins*, 489 N.E.2d 90 (Ind. Ct. App. 1986) (trial court could award custody of the children to mother in Oklahoma but condition custody on her return to Indiana with her children when she graduated from school); *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho Ct. App. 1985) (trial court could properly give custody of child to wife subject to limitation that she not remove child from the United States and not take the child to reside anywhere beyond a one hundred mile radius of the city without court order); *Carlson v. Carlson*, 661 P.2d 833 (Kan. Ct. App. 1983) (trial court could place a restriction on wife's custody of children that she remain in county); *Lebowitz v. Lebowitz*, 403 S.W.2d 871, 874 (Tex. Ct. Civ. App. - 1966) (relying on court's authority to "make such orders regarding custody and support of each such child or children, as is for the best interest of same: in upholding residency restriction contained in custody award; the trial judge's added restriction did not contravene the jury determination to award custody without the restriction); *Brito v. Brito*, 794 P.2d 1205, 1209 (N.M. Ct. App. 1990) (upholding custody award contingent on maintaining child's residence with relative to serve child's best interests).

Here, Mitten's proposed change in residence was but one factor in the court's best-interests analysis. The trial court's best interest finding is amply supported by the factual findings as well as the express recommendations and conclusions of a court appointed independent custody and visitation expert and a court appointed guardian ad litem both of whom testified at trial. L.M.K.O.'s guardian ad litem plainly concluded that it was in L.M.K.O.'s best interests to remain in Minnesota where she can enjoy regular and frequent contact with Ohanian and LaChapelle. Petition for Writ, App. B, at 49a-50a, Findings 50-51.

III. THE TRIAL COURT'S ORDER RESTRICTING THE RESIDENCE OF THE MINOR CHILD DOES NOT IMPERMISSIBLY BURDEN MITTEN'S RIGHT TO TRAVEL NOR DOES IT IMPERMISSIBLY INFRINGE UPON MITTEN'S FOURTEENTH AMENDMENT PRIVACY CONCERNS.

In her petition, Mitten asserts that the trial court's conditional custody order is an unconstitutional deprivation of her constitutional right to travel. *See* Petition for Writ, at 11. In *Shapiro v. Thompson*, this Court stated that the compelling-state-interest test would be triggered by any classification which serves to burden the exercise of the right to travel. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled in part on other grounds, Edelman v. Jordan*, 415 U.S. 651 (1974).

While it is recognized that citizens of this nation ordinarily have the constitutional right to travel from one state to another and to take up residence in the state of one's choice, there is also recognized a compelling state interest in restricting the residence of a custodial parent where it is

in the best interests of the child.[6] As to a custodial parent, "such person may be required to forego or forfeit some rights to custody or visitation, as the case may be, consistent with the best interests and welfare of the children and the rights of the other parent. *Carlson v. Carlson*, 661 P.2d 833 (Kan. Ct. App. 1983). In *Carlson*, the mother was required to move her residence from the state of Arizona to McPherson County, Kansas, because the trial court found that it was in the best interests of the children that they reside in McPherson County. *Id.* at 835. The mother argued that the restriction violated her constitutional right to travel. In rejecting this argument, the Kansas Court of Appeals recognized a legitimate state interest in restricting the residence of a custodial parent. *Id.* As the court in *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho Ct. App. 1985), explained:

> In virtually every case of divorce where young children are involved they are the innocent victims. There is no dispute that the best interest of the children dictates that they should have the love, support, guidance and companionship of both their parents. Such affords the greatest probability that the child will mature into a happy, useful, law-abiding and productive citizen capable

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6. *See In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377, 1382-83 (Mont. 1998) (the furtherance of the best interests of children may constitute a compelling state interest worth of reasonable interference on a parent's right to travel); *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) (in upholding conditional custody determination, the court found that there are few objectives more compelling than protecting the interests of children); *Carlson v. Carlson*, 661 P.2d 833, 835 (Kan. Ct. App. 1983) (citations omitted) (mother's right to travel was only limited by her desire to retain status as the custodial parent).

> of forming a part of a strong society and producing progeny in a like mold. The courts in divorce and child custody situations cannot guarantee these desirable results but it is the responsibility of the courts to take appropriate action to foster and promote such results when it appears that the parents because of the animosities between them are not going to cooperate in an effort to attain such goals. Providing and assuring the maximum opportunities for parental love, guidance, support and companionship is a compelling state interest that in my opinion warrants reasonable interference with the constitutional right of travel when necessary.

Ziegler, 691 P.2d at 780.

While no Minnesota court has specifically addressed the constitutionality of a contingent custody order,[7] Mitten's

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7. The only contingent custody order addressed by the Minnesota appellate courts was upheld without any challenge as to Constitutional concerns. *See Frauenshuh v. Giese*, No. C8-98-444, 1998 WL 481890, at *3 (Minn. Ct. App. Aug. 18, 1998), *rev'd and remanded on other grounds*, 599 N.W.2d 153 (Minn. 1999). In *Frauenshuh*, the court conditioned its custody award to the mother upon her return to the city where she had previously resided with the child's father. *Id.* The trial court concluded that it was in "the child's best interest to live with [his mother] in Ortonville but that if this is not possible, it is in the child's best interest to live in Ortonville with [his father]. *Id.* In her appeal, the mother did not advance a constitutional argument, but instead argued that it was "illogical" to conclude that a child could be "so irreversibly tied to a school and community that his best interests are better served by switching his physical custodian" than by living with the child's (Cont'd)

constitutional challenges are not novel issues in other states' appellate courts. Many other jurisdictions have addressed this issue and under similar factual circumstances, have upheld the constitutionality of conditional custody awards. *See, e.g.*, *Carlson v. Carlson*, 661 P.2d 833, 836-37 (Kan. 1983) (affirming residence restriction as in state's "legitimate interest" to promote children's best interests); *Clark v. Atkins*, 489 N.E.2d 90, 100 (Ind. Ct. App. 1986) (upholding order that mother return to state of children's previous residence to retain custody); *In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377 (Mont. 1998) (declaring that residence restrictions survive constitutional attack when there is "sufficient proof" the restriction is in child's best interests); *Everett v. Everett*, 660 So. 2d 599 (Ala. Civ. App. 1995), *reh'g denied*, (Feb. 17, 1995), *cert. denied*, (Apr. 12, 1995) (rejecting constitutional challenge to residence restriction); *Ziegler v. Ziegler*, 691 P.2d 773 (Idaho Ct. App. 1985) (finding state's "compelling governmental interest" justifies restriction on mother's right to travel). *See also Zwernemann v. Kenny*, 563 A.2d 1139, 1141 (N.J. Super. Ct. App. Div. 1989) (rejecting constitutional attack on state statute requiring parental consent to remove child from jurisdiction); *In re Custody of L.J.G.*, 415 N.W.2d 564, 567 (Wis. Ct. App. 1987) (rejecting constitutional attack to non-custodial parent's visitation residence restriction).

Specifically, in *Carlson v. Carlson*, the Kansas Court of Appeals upheld the trial court's custody award requiring the custodial mother to reside in the same county as the non-

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primary parent in another community. *Id.* In rejecting the mother's arguments, the Minnesota Court of Appeals explicitly upheld the trial court's authority to conditio custody on returning the child to his former city of residence. *Id.* at *1.

custodial father. *Carlson*, 661 P.2d at 837. On appeal, the mother claimed that the residency restriction violated her "constitutional right to travel" and the "equal protection clause" by failing to impose the same residency restriction on the non-custodian father. *Id.* at 836. In rejecting the mother's first constitutional challenge, the Kansas Court of Appeals stated:

> While we recognize that citizens of this nation ordinarily have the constitutional right to travel from one state to another and to take up residence in the state of one's choice, we also recognize a legitimate state interest in restricting the residence of a custodial parent. . . . "Of primary concern are the best interests and welfare of the children; all other issues are subordinate." . . . *[The mother]'s right to travel or even establish residence elsewhere is limited only by her desire to retain her status as the custodial parent.*

Id. (emphasis added, citation omitted).

In *Clark v. Atkins*, the Indiana Court of Appeals rejected a mother's constitutional challenge of an order granting her custody of the parties' minor children, provided that the mother return with the children to Indiana upon completion of education at an Oklahoma college. *Clark*, 489 N.E.2d at 100. Similar to this case, the *Clark* mother had moved from Indiana to Oklahoma with the children two years previously. *Id.* at 92. The Indiana Court of Appeals upheld the residency restriction. *Id.* Citing *Shapiro v. Thompson*, 394 U.S. at 634, the court stated that to withstand mother's constitutional attack the trial court's custody order restricting her right of travel must satisfy a "*compelling government objective.*"

Clark, 489 N.E.2d at 99 (emphasis added). In summarily dismissing the mother's constitutional challenge, the court reasoned:

> The straightforward answer to [the mother]'s argument is that the court's order does not impose any unnecessary burden whatever upon her right to travel. She remains free to where she may choose. *It is only the children who must be returned to Indiana.*

Id. at 100 (citing *Carlson*, 661 P.2d 833 and *Ziegler*, 691 P.2d 773) (emphasis added).

Here, the Minnesota Court of Appeals noted that the "trial court specifically found that it would be in L.M.K.O.'s best interests to reside in Minnesota where she could maintain a relationship with Mitten as her biological mother, Ohanian as her 'emotional parent,' and LaChapelle as her biological father." Petition for Writ, App. A, at 21a. The trial court did not restrict Mitten's right to remain in Michigan, the court only required that L.M.K.O. be returned to Minnesota. Any burden on Mitten's right to travel arises from her desire to remain L.M.K.O.'s sole physical custodian. The evidence in this case clearly supports the trial court's determination that some reasonable interference with unrestricted rights of travel is necessary. The parties' relationships were acrimonious and all parties expressed a very strong attachment and desire to be a part of L.M.K.O.'s life. The facts of this case certainly support the trial court's inference and conclusion that L.M.K.O. would suffer emotional harm if she was deprived visitation with Ohanian and LaChapelle and thus deprived of the parental love, affection, support, guidance and companionship to which she is entitled. Mitten

is free to change her place of residence without permission or order of the Court at any time if she should decide that it was not necessary that L.M.K.O. reside with her. The only restriction the trial court imposed was the residence of L.M.K.O.

Although the United States Supreme Court has recognized parental liberty interests, these interests have never been absolute. In *Lehr v. Robertson*, 463 U.S. 248 (1983), for example, the Court held that a putative biological father who had never established an actual relationship with his child did not have a constitutional right to notice of his child's adoption by the man who had married the child's mother. As the Court recognized previously, a parent's liberty interests " 'do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.' " *Id.* at 260 (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979)).

Under the facts of this case, Mitten and Ohanian made a decision during their relationship to begin a family. For the first half of her life, L.M.K.O. received daily care and parental guidance from both Mitten and Ohanian, and Mitten and Ohanian have both developed a significant parental relationship with the child. Petition for Writ, App. B, at 51a, 53a, Findings 58, 61(c). A custodial parent's liberty interests are "qualified by the special obligations of custody, the State's interest in protecting the best interests of the children and by the competing interests of the noncustodial parent." *In re Custody of D.M.G. and T.J.G.*, 951 P.2d 1377, 1381 (Mont. 1998). There are few objectives more compelling than the protections of the interests of children. *Clark v. Atkins*, 489 N.E.2d at 100. In *Clark*, the mother was granted legal and physical custody of the children, but the trial court

required her to return to Indiana with her children upon graduation from Oklahoma College. *Id.* The Indiana Court of Appeals noted that "to withstand a constitutional attack, a restriction on the right to travel must be necessary to a compelling governmental objective", and that "the law has few objectives more compelling than protecting the interests of the children." *Id.* Under the facts of that case, the court held that the trial court's order did not impose any necessary burden on Clark's right to travel because the children's residence was restricted, not Clark's — she remained free to live wherever she chose. *Id.*

Here, the trial court specifically found that it was in L.M.K.O.'s best interests to live in Minnesota where she could maintain her relationship with Ohanian as her "emotional parent," and LaChapelle as her biological father. As the Minnesota Court of Appeals held, "Minnesota's interest in protecting L.M.K.O.'s best interests is compelling and justifies intrusion into Mitten's privacy in her familial relationship with L.M.K.O." Petition for Writ, App. A, at 22a. Justice Stevens' dissent in *Troxel v. Granville*, __ U.S. __, 120 S. Ct. 2054 (2000), is particularly instructive in his discussion of the importance of examining the unique facts of each particular case in the determination of familial issues:

> The almost infinite variety of family relationships that pervade our ever-changing society strongly counsel against the creation by this Court of a constitutional rule that treats a biological parent's liberty interest in the care and supervision of her child as an isolated right that may be exercised arbitrarily. It is indisputably the business of the States, rather than a federal court employing a

> national standard, to assess in the first instance the relative importance of the conflicting interests that give rise to disputes such as this.

Id. at 2073.

The courts that have examined this issue have held that the interest in the protection of children is a compelling state interest. Again, Petitioner has failed to offer any evidence that the interest in the protection of children is not a compelling state interest. One of many factors in the analysis to determine the *initial* custody of a child is the proposed residence of the child. This factor alone bears on a number of related factors including the continuity and stability in the child's life, the opportunity to maintain significant familial ties, and the opportunity for meaningful contact with the child's emotional parent. Upon analysis of the unique facts of this case, the trial court determined that to continue the temporary residence and custody in Michigan was not in the best interests of L.M.K.O. Rather than focusing on her child's best interests, Mitten is asking this Court to toss out the "best interests of the child" standard, in favor of a "national standard" focusing instead on the best interests of the custodial parent. In *Troxel v. Granville*, this Court recognized the importance of deciding visitation issues on a case-by-case basis at the state-court level rather than imposing a national *per se* standard. *Troxel*, 120 S. Ct. at 2064. Similarly, an initial custody determination must take into account a multitude factors based on the unique circumstances of each case based on the best interests of the minor child. Rather than focusing on the breadth of factors that relate to the protection of children's interests in an initial determination of custody, Mitten is asking this Court to hold that a custodial parent's liberty interest in the care and

supervision of her child is an isolated right that may be exercised without regard to the noncustodial parents or the best interests of her child. The constitutional protection of parental rights should not be extended to essentially preclude any consideration of the protection of the child's interests.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectively submitted,

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